NTSB Order No.
EM-113

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D. C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D. C.
on the 24th day of July, 1984

JAMES S. GRACEY, Commandant, United States Coast Guard,

v.

RUSSELL DALE GAYNEAUX, Appellant.

Docket No. ME-93

OPINION AND ORDER

Appellant herein is seeking reversal of the Vice Commandant's decision (Appeal No. 2288) affirming an order issued by Administrative Law Judge Thomas E.P. McElligott, on February 10. 1982.[1] By that order the law judge affirmed a charge of negligence brought against appellant and thereupon suspended his Merchant Mariner's Document (No. 439-78-4714) for one month with an additional two-month suspension on 12 months' probation. The law judge's order is predicated upon his finding that on October 17, 1981, while serving as operator of the M/V Osage, appellant failed to properly navigate that vessel and the two tank barges it was pushing in tandem along the Gulf Intra-coastal Waterway, resulting in an allusion between the forward barge and the front light of the Range F aid to navigation near Deer Island at Mile 360. Appellant, on appeal, advances a number of contentions which constitute, generally, and attack on rulings of the law judge, as well as upon the ultimate substantive determination of negligence.

The alleged procedural errors on the part of the law judge led to his granting the Coast Guard's request to reopen its case for the purpose of submitting additional evidence which would establish that the M/V Osage was the vessel involved in the allusion and that respondent was then its operator. At the conclusion of the Coast Guard's case appellant had moved for dismissal of the charge against him based upon the insufficiency of the evidence presented. The law judge apparently agreed that the evidence presented to that time did not disclose which vessel was involved in the allusion nor

[1]Copies of the decision of the Vice Commandant (acting by delegation) and the law judge are attached.

who was its operator. However, he deferred a ruling on appellant's motion and allowed the Coast Guard, over appellant's objection, to reopen its case, at which time it moved the admission of certain Casualty Report forms (CG-2692)[2] in order to establish appellant's operation of the M/V Osage at the time of the allision.

Appellant's argument places considerable emphasis upon the law judge's failure to follow guidance in the Marine Safety Manual (CG-495) (hereinafter referred to as the Manual) which is applicable to enforcement proceedings. We find the thrust of his argument to be well taken.

In order to properly assess the law judge's actions in this instance, we must determine at the outset whether, when presented with appellant's motion to dismiss, after the Investigating Officer had concluded the Coast Guard's case and had rested, the law judge was required to rule upon it. We conclude that he was and, inasmuch as he agreed that the Coast Guard's prima facie case was lacking in certain necessary elements, the law judge should have granted appellant's Motion.

The law judge's decision to postpone ruling on appellant's motion and to allow the Coast Guard the immediate opportunity to reopen its case and present additional evidence acted effectively as a denial of the motion at the time it was made. Section 71-7-85 of the Manual advises that in reaching a decision on a motion to dismiss:

> "the ALJ will determine if there is any substantial evidence which, together with all proper inferences to be drawn therefrom and all applicable presumptions, reasonably tends to establish every essential element of the charge or charges included in any specification or specifications to which the motion is directed."

It is axiomatic in this case that whether appellant was the operator of the vessel involved in the allision is an "essential element" of the charge pending against him. The Coast Guard had failed to introduce any evidence connecting appellant, and for that matter any specific vessel, with the allision when the investigating officer rested and hence failed to present a prima facie case.

In certain instances a law judge may reserve a decision on a motion to dismiss until after the completion of an appellant's case. However, such action on the part of the law judge should not

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[2]Exhibits 7(a), 7(b) and 7(c).

be taken for the purpose of permitting the Coast Guard to reopen its case-in-chief. In another context, but of relevance here, the Manual cautions that when the Coast Guard presents rebuttal evidence. "...Care should be taken by the Administrative Law Judge that the rebuttal evidence presented by the investigating officer is, in fact, rebuttal evidence, rather than a reopening of the investigating officer's case in chief."[3]

The deficiency in the Coast Guard's case at the time the investigating officer rested was neither minor nor technical in nature. The Coast Guard concededly had failed to establish a fundamental part of its substantive prima facie case. Absent introduction of additional evidence by the Coast Guard, the charge against appellant was not sustained. While, in this instance, the evidentiary deficiency apparently could be remedied easily, the standard for review of the propriety of the law judge's ruling is not whether there was an expedient cure for the Coast Guard's failure to meet its burden of proof before it rested. It is, rather, whether the law judge properly could defer ruling on appellant's motion to dismiss and then afford the Coast Guard an opportunity to correct the fundamental evidentiary deficiency identified by the motion. We conclude that, given the circumstances presented herein, the law judge erred in doing so.[4]

In apparent recognition of the fact that a party has a fundamental right to dismissal of a case where the essential elements of the charge have not been proven, the Coast Guard's Manual, as noted above, expressly authorizes the filing of a motion to dismiss to test the sufficiency of the evidence. While we recognize that there may be valid reasons for a law judge to reserve decision on such a motion until after an appellant puts on a defense or decides not to submit any evidence, deferring a ruling on a motion to dismiss for the purpose of affording the Coast Guard what amounts to a second opportunity to prove its case is not such a reason. Moreover, the deferral in this instance not only deprived appellant of his right to challenge the Coast Guard's evidence at the appropriate time, but additionally, since it was the motion itself which apparently alerted the Coast Guard to the necessity for further proof of its case, the deferral also effectively turned the exercise of that right against him.

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[3]See Section 71-7-90.

[4]The law judge's obligation, once the motion had been filed, was not to ascertain whether the Coast Guard might be able to prove the alleged charges through the submission of additional evidence, either in its possession or available to it, but rather to determine whether the Coast Guard already had proved the charge.

In sum, we find that at the time appellant made his motion to dismiss the Coast Guard had rested without establishing a prima facie case, and that appellant then was entitled to a ruling on his motion predicated solely on the evidence thus far presented by the Coast Guard. Consequently, the law judge's subsequent denial of appellant's motion, based primarily on evidence submitted by the investigating officer after he was permitted to reopen his case, constituted error and requires reversal.[5]

ACCORDINGLY, IT IS ORDERED THAT:

1. Appellant's appeal is hereby granted; and

2. The decision of the Vice-Commandant in Appeal No. 2288 is hereby reversed.

BURNETT, Chairman, GOLDMAN, Vice Chairman BURSLEY and GROSE, Members of the Board, concurred in the above opinion and order.

[5]In denying appellant's motion the law judge noted that he "...could dismiss without prejudice to Coast Guard's renewal of the case. But, then the Coast Guard could turn around and reserve him and we could have to retry the case all over again and then they could... probably identify him in some... manner..." (See tr. at 59). Although we have no presence occasion to rule on the applicability of the doctrines of res judicata or collateral estoppel, it appears from the foregoing that the law judge may not have considered their possible effect upon any effort by the Coast Guard to refile the charge in this case in a subsequent proceeding. Moreover, the Vice Commandant (Decision at page 11) also implicitly dismisses these doctrine, which we believe constitute a part of administrative due process.